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No. 73-1340

In the Supreme Court of the United States

OCTOBER TERM, 1973

THE GERSTENSLAGER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, The Gerstenslager Company, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals for the Sixth Circuit (Pet. App. A, *infra*, pp. 9-10) was entered on December 13, 1973. The decision and order of the National Labor Relations Board (Pet. App. B, *infra*, pp. 11-13) were entered March 6, 1973 and are reported at 203 NLRB no. 40. The findings and suggested order of the National Labor Relations Board Administrative Law Judge adopted by the NLRB is at Pet. App. C, *infra* pp. 14-50.

JURISDICTION

The judgment of this court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether any or all of the following conduct by The Gerstenslager Company in negotiations with the Union was unlawful as a violation of Sections 8(a) (5) or 8(a) (1) of the Act: refusal to allow the Union to conduct its own time study; dealings directly with employees; and abrogation of tentative agreements and proposing more stringent provisions.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Section 151, *et seq.*) are as follows:

> SECTION 158(a) It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 157 of this title . . . (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 159(a) of this title.

STATEMENT OF THE CASE

The following statements of fact are summarized from the findings of the National Labor Relations Board, Administrative Law Judge which findings were adopted by the Board. (Pet. App. G, pp. 15-36 *infra.*)

Since 1941, the International Union, Allied Industrial Workers of America, AFL-CIO, Amalgamated Local Union No. 813, has been the certified representative of The Gerstenslager Company's hourly paid employees, excluding office clerical, professional and supervisory employees.

The last collective bargaining agreement between the Company and the Union expired April 4, 1971. Pursuant to notice served by the Union, the parties met February 10, 1971 to begin negotiating a new agreement. After about twelve meetings, the Union struck the Company on April 4, 1971. The strikers were all eventually, permanently replaced. On September 18, 1971 the pickets were removed and on September 21 or 22, 1971, the Union informed the Company, in writing, of the strikers' unconditional request for reinstatement. The Company has hired no new employees since that date. Some of the strikers have been recalled, others have not. The parties held a total of approximately thirty-one meetings between February 10, 1971 and December 9, 1971. The Company stands ready to meet again upon request.

At the first meeting, the Union presented ninety-one proposed changes in the agreement which was about to expire. During the ensuing months union added seven additional demands. The February 10th meeting was devoted chiefly to an explanation of its proposals, by the Union. In addition at this meeting and/or at subsequent meetings, the parties agreed that in accord with past practice, all agreements would be tentative, until a complete collective bargaining agreement was reached.

The second meeting was held February 17, 1971. The Company presented its proposals consisting of thirty changes in the old contract.

During subsequent negotiating sessions, concessions were made by both sides. The Union requested the Company to prepare a complete proposed contract for submission to its membership at a Union meeting scheduled for March 24th, and to provide each employee with a copy. The Company did so.

At the Union membership meeting on March 24th, the employees voted to reject the new contract offered by the

Company, and to strike when the old contract expired. The Union went out on strike on April 4, 1971.

During the strike the parties continued negotiating and the Company continued to operate the plant, at first with supervisors and office employees. In June the Company began hiring permanent replacements.

On August 4, the parties conducted an in-depth review of the bargaining. There was give and take on both sides.

The Company received written notice from the Union of the termination of the strike on September 21 or 22, 1971. The last replacements were hired during the week ending September 18, and reported to work on September 20, 1971.

In early October, the Company began recalling strikers on the basis of strict time senority. Each recalled striker was sent a letter inviting him to come in for interviews and to sign necessary employment forms. Upon arrival at the plant, the striker was requested to sign a document entitled "Request For and Acceptance of Recall." A copy of the document was signed by every striker and placed in his personnel folder.

The Company made a new proposal to the Union on October 12, 1971. This proposal was a complete agreement except for wages. It contained provisions which were advanced for the first time. After October 27, the Company distributed to employees copies of a memo entitled "Attendance Guidelines." It provided among other things, for disciplinary action for unexcused absences, that had not been in effect before.

At a negotiating meeting held on November 23, 1971, the Union made two alternate contract proposals, either of which it would accept: (1) the old agreement (which expired April 4, 1971) with the term to be negotiated, plus fifteen cent wage increase, already in effect (2) the same as (1)

except including agreements reached as of August 6, 1971 in a document entitled "Status of Negotiations." The Company rejected both proposals.

The final bargaining session was held December 9, 1971. The company presented another draft agreement. In the December 9 document, the Company proposed a detailed merit rating productivity system. The rating would be done by the Company. Classification and job evaluation had been discussed on many prior occasions, but had always been put off at Union insistence. The Union requested permission to have its time study engineer conduct a job evaluation study in the plant. The Company refused on the ground that it would serve no purpose in its type of operation and in formulating the merit system at this stage.

The Company, shortly before Christmas, distributed to the employees a sheet entitled "Gersco News Letter," which said that management was putting a merit rating system into effect; however, no merit rating system has been put into effect.

A. BOARD'S DECISION

The Board found that in the background period, the overall conduct of the Company was not inconsistent with a desire ultimately, to resolve its differences with the Union. However, with the termination of the strike, the Company's attitude toward the negotiations clearly changed. The Company, early in October, began to deal directly with the recalled strikers; that the Company's abrogation of previously agreed to (whether tentatively or not) provisions and the Company's more restrictive demands in October and December, contrasted with the Company's objectives earlier, were solely to undermine the Union position, that the refusal of the Company to allow time study by the Union was indicative of bad faith.

The Board ordered the Company to cease and desist from

failing and refusing to bargain collectively, in good faith with the Union by refusing permission for the Union to conduct its time study, by dealing directly with employees in the unit, and by-passing the Union, and by abrogating agreement and proposing more stringent provisions without reasonable cause; and in any like related manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act.

The Board further ordered the Company, upon request, to bargain collectively, in good faith with the Union and to post Board directed notices at the Company's plant. (Pet. App. B, *infra*, p.12) adopting Administrative Law Judge's findings and conclusions (Pet. App. C. p., *infra*)

B. THE COURT'S DECISION

The court below held that there was substantial evidence to support the National Labor Relations Board findings of fact and conclusions of law. It ordered that the decision and order of the Board be enforced, (Pet. App. A, *infra*, p. 4-10).

REASONS FOR GRANTING THE WRIT

The Board found that the Company in a number of matters dealt directly with the employees. It further recognized that in some cases this was at the express request of the Union. (Pet. App. C, *infra*, p.20) Employees dealt with directly included members of the bargaining committee. In no case was such dealing in derogation of the Union. In *Procter and Gamble Mfg., Co.*, 160 N.L.R.B., 334 62 LRRM 1617 (1966), the Board approved communications directly with the employees on facts similar to the case at bar.

The Board recognized that the parties had agreed at several stages of the negotiations that all agreements were tentative until a complete agreement was reached. (Pet. App. C, *infra*, p. 18) There were substantial changes in the condition

of the Company, its business, and its employee complement between the time when negotiations started, February 10, 1971 and October 12, 1971, when the Company submitted a complete package proposal; in which many proposals were changed from those tentatively agreed on prior thereto. Forcing the Company to accept a contract with provisions to which it had never agreed, would be in violation of the principles enunciated in *NLRB* v *W. R. Hall Distributor* 341 F 2d 359 and *Jeffrey DeWitt Insulator Co.,* v *NLRB* 91 F 2d 134, Cert. Den. 302 US 791.

In *Lonzano Enterprises* v *NLRB* 327 F 2d 814, a complete contract had been agreed upon by the parties. The agreement was actually signed by the employer, but not delivered. Later the employer repudiated the contract. The court said on page 819, "we do not at all mean to hold that in general, the normal rules of offer and acceptance are not determinative as to whether an agreement has been reached in a collective bargaining situation, we do hold that where as in this case, the terms proposed by the Union are in fact acceptable to the employer, but delivery of the signed contract is withheld for the obvious tactical purposes that here appear, it is proper for the Board to conclude there has been a failure or refusal to execute a written contract incorporating the agreement revealed within the meaning of Section 8. The decision of the Board, with respect to tentative agreements reached by the Petitioner in this case, and the Union when taken in light of the facts found by the Board, is in conflict with the decision of the Ninth Circuit in *Lonzano Enterprises v NLRB,* supra and with *NLRR* v *Ralph Printing and Lithographing Company,* 433 F 2d 1058 cert. denied 401 U.S. 925.

The Board found that the Company had proposed a Merit system (not a job classification system). At no time did

the Union indicate its willingness to consider a Merit Rating System. The Board further found that the Company refused to allow the Union to send in time study engineers to the Company's plant and that in so doing the Company violated its duty to bargain. In so finding the court is in conflict with the Second Circuit Court of Appeals in *Fafnir Bearing Co.*, v *NLRB*, 362 F 2d 716. There the court said: "Independent time studies by the Union should be authorized only when essential to the Union to function intelligently in behalf of employees and only when studies will not unduly disrupt productive objectives of the employer." Since the Company's proposal was a Merit System in skeleton form only, which was in no way a job classification system or other purely job related system, until such time as a time study by the Union could lend substance to the negotiations, it would not have been essential to the Union's functioning and it could have served no purpose other than to disrupt productive operations.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ARTHUR W. MOORE
Attorney for The
Gerstenslager Company

APPENDIX A

United States Court of Appeals for The Six Circuit

No. 73—1443

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE GERSTENSLAGER COMPANY, RESPONDENT

ORDER

Before WEICK, McCREE and MILLER, Circuit Judges.

The Board has petitioned for enforcement of its decision and order reported at 202 NLRB No. 40, which found that the Company violated Sections 8(a) (5) and (1) of the Act by failing and refusing to bargain collectively and in good faith with the Union to conduct its own time-study, by dealing directly with and entering into personal employment contracts with employees of the Union and by-passing the Union, and by abrogating oral agreements and proposing more stringent provisions without reasonable cause.

The evidence was taken before an Administrative Judge, who made credibility assessments and drew inferences from the evidence, and who found that the Company did violate the Act in the manner charged. His findings of fact and conclusions of law were adopted by the Board.

We find there was substantial evidence to support the findings of fact and conclusions of law.

It is therefore ORDERED that the decision and order of the Board be and it is hereby enforced.

ENTERED BY ORDER OF THE COURT

JAMES A. HIGGINS,
Clerk

APPENDIX B

UNITED STATES of AMERICA before the NATIONAL LABOR RELATIONS BOARD

Case 8—CA—6772

THE GERSTENSLAGER COMPANY

and

INTERNATIONAL UNION ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO, AMALGAMATED LOCAL UNION No. 813

DECISION AND ORDER

On August 28, 1972, Administrative Law Judge[1] Almira Abbot Stevenson issued the attached Decision in this proceeding. Thereafter, Respondent and the Charging Party filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and[2] conclusions of the Administrative Law Judge and to adopt her recommended Order.

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[1]The title of "Trial Examiner" was changed to "Administrative Law Judge" effective August 19, 1972.

[2]Member Jenkins would additionally find, in agreement with the Charging Party's exceptions, that (con't.)

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, The Gerstenslager Company, Wooster, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington D.C. March 6, 1973

EDWARD B. MILLER, *Chairman*
HOWARD JENKINS, JR., *Member*
RALPH E. KENNEDY, *Member*
NATIONAL LABOR RELATIONS BOARD

(SEAL)

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[7]Respondent's Merit-Rating proposal of December 1971 was made for the purpose of undermining the Union's position as bargaining representative and constitutes additional evidence of Respondent's failure to bargain in good faith. In his view, there is no valid basis to distinguish the making of the Merit-Rating proposal from the other more stringent provisions proposed by the Respondent which are herein found to have consttuted a part of the Respondent's total course of unlawful conduct. Indeed, a careful analysis of Respondent's Merit-Rating proposal reveals it as completely undermining previously agreed-to provisions and totally destructive of prior negotiations. (con't.)

'Moreover, in Member Jenkins' view, there is no basis for assuming, as did the Administrative Law Judge, that the General Counsel treated the Merit-Rating proposal different from the series of other proposals herein found to be indicative of Respondent's failure to bargain in good faith. To the contrary, it would appear that this proposal, along with the other proposals, was presented as one more facet of Respondent's unlawful bargaining conduct. Finally, Member Jenkins finds little or no evidence supporting the Administrative Law Judge's finding of "changed circumstances" justifying Respondent's proposal. In his view the "evidence" in this regard consists of nothing more than unsupported, self-serving statements of Respondent's witnesses, plainly insufficient in solid substance necessary to ground a finding of "changed circumstances."

APPENDIX C

United States of America
before The National Labor Relations Board
Division of Trial Examiners
Washington, D. C.

Case 8—CA—6772

THE GERSTENSLAGER COMPANY

and

INTERNATIONAL UNION ALLIED
INDUSTRIAL WORKERS OF AMERICA,
AFL-CIO, AMALGAMATED LOCAL UNION NO. 813

Curtis Mack, Esq., for the General Counsel.

Eugene Kroneker of Grafton, Ohio and *Nick Serraglio* of Avon Lake, Ohio, for the Charging Party.

Arthur W. Moore, Esq., of Wooster, Ohio for the Respondent

Before: Almira Abbot Stevenson, Trial Examiner

TRIAL EXAMINER'S DECISION
STATEMENT OF THE CASE

This case was heard at Wooster, Ohio, April 18-21, 1972. The original charge was filed December 17, 1971, and served on the Respondent December 23, 1971. The complaint was issued January 31, 1972. The issues are whether the Respondent, on and after September 15, 1971, violated Section 8(a) (5) and (1) of the National Labor Relations Act, as amended, by (1) failing and refusing to bargain in

good faith; (2) unilaterally instituting a merit-rating system and a different method of computing seniority; (3) conducting direct negotiations with employees, and negotiating and entering into personal employment contracts individually with employees; (4) withdrawing proposals previously agreed to; (5) unilaterally eliminating superseniority of Union officers; and (6) unilaterally terminating an existing hospitalization plan.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Respondent, I make the following:

Findings of Fact[1] and Conclusions of Law

I. JURISDICTION

The Respondent is an Ohio corporation engaged at Wooster, Ohio, in the manufacture of bookmobile trucks and van trucks used in the transportation of mail by the U. S. Postal Service Corporation. It annually receives materials and supplies valued in excess of $50,000 from points outside the State of Ohio, and ships finished products valued in excess of $50,000 directly to points outside Ohio. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The Respondent also admits, and I find, that the Charging Party (herein called the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

I find, as alleged in the complaint and admitted in the answer, that the Union has been since 1941, and is now, the exclusive representative of the Respondent's employees in an appropriate unit of all hourly rated plant employees, excluding office clerical employees, professional employees, and supervisors as defined in the Act.

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[1]Except as indicated, the facts are undisputed. The credibility findings herein are based on demeanor, the knowledge upon which testimony is based, whether it is specific or vague, whether or not it is corroborated or supported, and the probabilities.

I have taken into consideration Personnel Director C. Robert Rasor's admission on the stand that in 1965 he pled guilty to a charge of embezzlement for which he was placed on probation for 2 years and resigned from the bar of the State of Ohio. This incident of dishonest conduct has caused me much concern in assessing Rasor's credibility. However, the record also shows that Rasor has served his probation, made restitution, and served in the responsible position of personnel director to the Respondent's apparent satisfaction since 1967. In these circumstances, and based on my observation of him on the witness stand, I have concluded that his testimony is entitled to be evaluated on the same basis as that of the other witnesses, and I have so evaluated it. Cf. *N.L.R.B.* v. *Dinion Coil Company, Inc.*, 201 F .2d. 484, 487-490; *Federal Stainless Sink Div. of Unarco Industries, Inc.*, 197 NLRB No. 76, page 8.

The last collective-bargaining agreement between the Respondent and the Union expired April 4, 1971. Pursuant to notice served by the Union, the parties met on February 10, 1971, to begin negotiating a new agreement. At this and subsequent meetings Attorney Arthur Moore, Vice President and General Manager Richard Fishburn, and Personnel Director C. Robert Rasor negotiated for the Respondent. For the Union were Eugene Kroneker, Regional Representative, subsequently replaced by Regional Representative Nick Serraglio, and a shop committee of employees—Howard Cooper, Robert Eyler, Christy Nichols, Don McMichoels, and Joseph Hughes. After about 12 meetings, the Union struck the Respondent on April 4, 1971. The strikers were all eventually permanently replaced. On September 18, 1971, the pickets were removed, and on September 21, 1971, the Union informed the Respondent of the strikers' unconditional request for reinstatement. The Respondent has hired no new employees since that date. Some of the strikers have been recalled; others have not. The parties held a total of approximately 31 meetings, with a Federal Mediator in attendance at most of them, between February 10 and December 9, 1971, the date of the last meeting. No agreement has been reached. The Respondent stands ready to meet again upon request.[2]

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[2]To the extent that Union Representative Serraglio intended to imply, in his testimony that Attorney Moore refused a Union request to meet after December 9, I discredit him and credit Moore's testimony to the contrary.

[3]I discredit the testimony of Union Representative Kroneker and bargaining Committee Chairman Cooper that Moore and Fishburn told them, at this and subsequent meetings, there would never be a Union shop in the plant. I credit Moore, Fishburn, and Rasor that they told the Union that they would not agree to a union shop within the foreseeable future.

At the first meeting, February 10, 1971, the Union presented 91 proposed changes in the agreement which was about to expire, including a yearly wage increase of $1 an hour plus "cost of living" and more liberal fringe benefits, union shop to be substituted for the maintenance-of-membership clause in the old contract,[3] abolition of working foreman, and "plant-wide seniority." The Union also proposed a substitute for a provision in the expiring contract that the company could subcontract "such work as it has done in practice in the past," a new provision restricting subcontracting to "the maintenance of the buildings." During the ensuing months, the Union added 7 additional demands. The February 10 meeting was devoted chiefly to an explanation of its proposals by the Union. In addition, at this meeting, and/or at subsequent meetings, the parties agreed that, in accordance with past practice, all agreements would be tentative until a complete collective-bargaining agreement was reached. Although all witnesses testified to the same effect regarding the substance of this agreement by the parties, they testified differently as to their understanding of its meaning. Thus, the Union's witnesses testified it meant that items agreed to or tentatively agreed to, were simply "agreed to" and would not have to be negotiated further; the Respondent's witnesses testified that all such items were merely "tentatively agreed to" and could be reopened in changed circumstances.

The second meeting was held February 17, 1971. The Respondent presented its proposals, consisting of 30 changes in the old contract. Included in the Respondent's proposals were the following, numbered as in the document presented to the Union:

(5) A subcontracting clause giving the Company "the right to subcontract out such work or services as it believes can be done more expeditiously, more efficiently, or less expensively than it can be done in house."

(7) An amendment to the old contract requirement that a steward or committeeman will acknowledge in writing delivery of an employee discharge or discipline notice, providing that any steward or committeeman who refused to do so be suspended for 5 days.

(8) A new provision that grievances could be initiated only by the employee or employees directly affected, except that grievances which could directly affect a substantial number of employees could be filed by the Union.[1]

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[1]Although the General Counsel contends that the Respondent's proposal 9 would have imposed a new requirement that all grievances which reach step 2 must give the names of all grievants, and be signed by at least one grievant, both these requirements had been included in the expiring contract (Art. V, Sec. 4, Step Two, page 17). In any event, the respondent withdrew his proposal before March 22. Similarly, with respect to the Respondent's proposal 6, that no employee be permitted to leave his work to discuss any matter with a shop committeeman or steward, but must request his steward be sent to the employee's work station. The Respondent withdrew this proposal at or before the March 22 meeting when the Union acknowledged that all employees knew they were not permitted to stop by the stewards, or committmen's work stations to talk.

During subsequent negotiating sessions, concessions were made by both sides. The Union requested the Respondent to prepare a "complete proposed contract" for submission to its membership at a Union meeting scheduled for March 24, and to provide each employee with a copy. The Respondent did so, and the parties met on March 22, to discuss it.

In paragraphs 5, 7, and 8, of that document the Respondent reaffirmed its original proposals stating that those proposals had not been agreed to.

The document indicates that a total of 2 Company proposals had been agreed to; 15 (including a Company-proposed 3-year term, and a more liberal working foreman provision) had not been agreed to and were still on the table; and that 6 had been withdrawn by the Company after the Union rejected them. It indicates that 19 Union proposals had been

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At a meeting held on March 8, an issue was raised by the Respondent regarding the establishment of a classification system. There was no classification system at the plant, all employees being paid at the same scale whether they performed welding, assembly, finishing or any other job. Although No. 53 of the Union's initial proposals of February 10 was "Standard Job Classification" the meaning of which is unexplained in the record, there is testimony that the Union objected to the Respondent's proposal and was of the view that, in any event, there was no time to devise a classification system during the current negotiations. The parties then agreed to put the question aside and to start work on such a system after a new contract was signed.

agreed to. The Company refused to agree to 3 others and counterproposed as to them. Seven additional provisions were designated as part Company and part Union, to which agreement had been reached, at least in principle, the Company suggesting language as to 2.[5]

The Respondent put forward its first monetary offer at this time, consisting of increased fringe benefits, and an hourly wage increase, designated as "final," of 25 cents a year for 3 years in increments of 15 cents and 10 cents each year. Although several witnesses testified that there were further monetary proposals and counterproposals during this meeting, there is no credible evidence that the Respondent varied from its offer of an immediate wage increase of 15 cents effective April 4, 1971, with the second 1971 increment of 10 cents due October 4.

At the Union membership meeting of March 24, the employees voted to reject the new contract offered by the Respondent, and to strike when the old contract expired. Although additional negotiating sessions were held, (a total of 12 before the strike) the Union struck the Respondent April 4, 1971, as indicated. All witnesses testified that the major issues at the time of the strike were Union shop, working foreman, and the Respondent's authority to subcontract unit work.[6] All testified there were no impasse on wages.

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[5]Figures are approximate, as the document is not altogether clear. Some provisions are designated as agreed to in part or in principle.

[6]The March 22 document made no reference to other proposals made by the Union on February 10 and by the Company February 17, and there was no testimony concerning their status on March 22.

During the strike, the parties continued negotiating, and the Respondent continued to operate the plant, at first with supervisors and office employees. In early June, however, the Respondent put into effect the 15-cents-an-hour wage increase offered to the Union in March, and began hiring permanent replacements. Contrary to past hiring practice, the Respondent hired all replacements at top scale which with the 15-cent increase, amounted to $3.10 an hour.[7]

At a meeting on June 22, the parties tentatively agreed to change the definition "old" employees with plant-wide seniority for purposes of "layoffs, recall, promotions, and transfers" from those employed before 1960, as provided in the expired contract, to all those employed longer than 18 months; those employed for less than 18 months were to be considered "new" employees with only division-wide seniority.

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[6]Union Representative Kroneker testified that the Respondent's proposal to restrict the kind of grievances which could be filed by the Union, to which the Union objected, was discussed at a number of meetings, but no agreement had been reached at the time of the strike. He indicated, however, that this was not a major issue at the time of the strike. He also testified that another issue was the Company's desire to dispense with the old contract provision giving an employee the right to have a steward or committeeman present when he is disciplined or discharged. Other evidence indicates, however, that the Respondent made such a proposal for the first time on October 12, 1971.

[7]At first the Respondent hired mostly students, informing them that their jobs were permanent. It advised the Union, however, that most of the students would probably return to school, so there would be no problem about recalling strikers when the strike was over. As the summer wore on, with no end of the strike in view, the Respondent, after late July, hired more and more non-student replacements.

[8]I credit Kroneker's testimony, supported by documentary evidence, that the Respondent made this proposal on June 25, despite Moore's purported lack of knowledge of it.

The result of this change, which was to take effect only after all strikers were recalled or on April 1, 1972, whichever occurred first, was to increase the number of employees entitled to plant-wide seniority. Tentative agreement was also reached to accept the subcontracting provision proposed by the Respondent.

At the next meeting, June 25, the Respondent proposed that the seniority provision agreed to on June 22, be changed by defining old employees as those hired before, and new employees as those hired after, January 1, 1968' When the Union strongly protested, the Respondent affirmed its June 22 agreement on this point.

The Respondent also dropped its proposed suspension of stewards and committeemen for refusing to accept or sign a discharge or discipline slip (original proposal 7) and proposed that tender of such a slip would constitute delivery and acceptance by, or notice to, the steward or committeemen, and the employee affected.

On July 1, 1971, the Respondent offered the Union a straight 25-cents-a-year wage increase.

On August 4, the parties conducted an in-depth review of the bargaining. All witnesses agree that there was give-and-take, both sides changing positions, at this session. Thereafter, at the next meeting, in early or mid-August, the Respondent submitted to the Union a document entitled "Status of Negotiations" dated August 6, 1971.' The document listed some 6 company,[10] 20 Union, [11] and 5 joint [12] proposed changes in the old contract as agreed upon. Listed, in paragraph 2, as agreed upon was the subcontracting clause proposed by the

Respondent and agreed to by the Union July 22 and 25. Although paragraph 2 of this document also stated that agreement on this change was contingent on the Company's accepting a more liberal plant-wide seniority provision, paragraph 9 listed among the Union proposals agreed to the same more liberal definitions of old and new employees agreed to on June 22 and 25. The August 6 document also listed agreement to a Company proposal that the shop committee chairman or co-chairman would sign any discharge or discipline slip which the steward or committeemen refused to sign (paragraph 3).

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[9]To the extent it is relevant, I do not credit Kroneker's testimony that the Union had requested, and expected, a contract proposal and not a document summarizing the status of negotiations, from the Respondent at this time. I infer from Kroneker's testimony that there is no substantial dispute that the August 6 document accurately reflected the status of negotiations at that time.

[10]Checkoff, subcontracting, discipline slips, overtime records, Union officials' assignment to first shift, employee physical inability to do assigned work.

[11]Loss of seniority, transfer to salary status, new and old employees, discharge for garnishment or mental incapacity, waiver of doctor reports, work clothes furnished, auditor's report of profit-sharing plan, industrial injury, physical exams on company time, vending machine money, company payments into pension plan, retirement awards, reactivation of dormant repartments, pay for attending grievance meetings, job-bidding procedure, shift differentials, mandatory retirement, pension computations, departments to be listed in contract, furnishing copies of contract and handbook.

The document indicated that 5 Company proposals (including a 3-year contract term)[11], and 39 Union proposals (including union shop)[12] were still on the table. It listed 9 joint provisions (including working foremen) as also still being negotiated.[13]

On August 30 the Union sent a telegram offering to return to work on condition that all strikers be returned to their jobs. The Respondent refused this offer as not unconditional. The background period ended with a request by the Union, made at a September 10 meeting, that the Respondent state its position with regard to the return of the strikers.

B. *Events on and after September 15, 1971*

The Respondent replied to the Union's September 10 request in a letter dated September 15, 1971, which stated, in pertinent part:

The position of the Company is as follows with respect to the specific matter hereinafter set out.

> 1. If the Union, on behalf of the striking bargaining unit, offers unconditionally to call off the current strike, the company will, when openings become available, take back the presently striking employees in line of strict "time" seniority. In other words the employee with the earliest date of hire will be taken back first, then on down the line from there.

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[11]Absence due to ill health, injury, or layoff; job loans; overtime for employees temporarily transfered; compulsory and noncompulsory overtime; leaving company premises.

[12]Kroneker testified that the Company and the Union had agreed to a 3-year term "as long as we were able to get along with the rest of the proposals." Other Company proposals still on the table dealt with work rules, suspension and discharge procedure, distribution of overtime, job bids.

2. In the event of a subsequent layoff the Company will consider all employees, then working, for layoff purposes, to be of equal seniority. The Company will put into effect a rating system, the details of which have not been definitely worked out, whereby each plant worker will be rated by his supervisor and one other Company official at periodic intervals. The rating will be based primarily on the individual's productivity. In a layoff, the least productive according to the last ratings will be laid off.

The net effect of the foregoing is that for layoff purposes all employees (1) hired during the strike, (2) who continued working during the strike, (3) who returned to work before the strike was over, (4) who are recalled after the strike is terminated by the Union, will have equal seniority as to "time."

Union Representative Kroneker advised the Respondent by telephone at about this time that the strike would be terminated. The Respondent requested that this information

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[11]Union proposals not agreed to dealt with Union security, leave for death in family, job bids, holidays, eligibility for holiday pay, working foremen, vacation pay, sick pay, eligibility for hospitalization, hospitalization coverage, retirement pay, cost of living, 1½ time for all Saturday work, life insurance, dust system, departments, safety committee, "Choice of arbitration or strike," selling merchandise to employees, inclusion of truck drivers in unit, vending machines, statement of relations between Company and Union. Some of these subjects were dealt with in 2 or more Union proposals.

[12]Death in family, posting, job bidding, discharge for insubordination, holiday eligibility, working foremen, sick pay. Some overlap of subjects listed in various categories is noted.

be put in writing. A letter dated September 16, 1971, over the signature of Carl Smigel, Region 3 Director of the Union, containing an unconditional offer to return all strikers to work was then dispatched to the Respondent.[9] The Respondent received this letter on September 21 or 22.

The pickets were removed Saturday, September 18, 1971.

The last replacements were hired during the week ending September 18, and reported to work Monday, September 20.

At a meeting held on Tuesday, September 21, the Union expresses disagreement with the Respondent's September 15 letter, particularly paragraph 2 proposing equal-time seniority in future layoffs. The Respondent advised the Union that it had not received a letter from the Union offering unconditional return of the strikers, but agreed not to hire any new employees and agreed to recall the strikers as vacancies occured.[10]

In early October, the Respondent began recalling strikers on the basis of strict time seniority.[11] The rate paid was $3.10 an hour. Each recalled striker was sent a letter inviting him to come in for interviews and "to sign necessary employment forms" on a specified date prior to reporting for work on a date also specified in the letter.

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[9]There is no record support for the Respondent's assertion, in its brief, that the Union requested reinstatement of Union members only.

[10]I have discounted Kroncker's testimony that he also requested at this meeting that all office personnel be returned to the office but the Respondent replied that this would not be done immediately. As opposed to this vague testimony, which was not pursued by the General Counsel, there is otherwise undisputed and credible evidence that all strikers were permanently replaced.

Upon arrival at the plant, the striker was requested to sign a document entitled "Request for and Acceptance of Recall." The document stated that the signatory "does hereby request and accept such recall on the terms and conditions set forth." The document further stated:

> The employee acknowledges that no contract currently exists between the Company and Allied Industrial Workers Union and that any provisions of former contracts do not apply to the employment relationship between himself and the Company, except as the same may be required by law.
>
> The employee acknowledges that his employment shall be upon the same terms and conditions as that of employees hired since April 4, 1971, that the general range of such terms and conditions have been explained to him by representatives of the Company, and that he is aware that many such terms and conditions will be further developed in the future by the Company.
>
> The employee acknowledges that Company representatives have explained to him the emphasis placed on productivity in the company's managment philosophy, that employees will be periodically merit rated, that wage rates will be classified as to skill and productivity dependent upon the individuals skill and effectiveness, and that persons failing to maintain certain merit levels may be subject to discharge.
>
> The employee acknowledges that lay-off or recall from lay-off and certain other rights will be dependent upon individual merit rating rather than prior length of service.

A copy of this document was signed by every striker who returned to work, and placed in his personnel folder. The Respondent did not advise the Union of this document or discuss it with the Union.

The next significant development in the negotiations, consisted of the submission of the Respondent's October 12, 1971, proposal. In contrast to the prior documents containing proposals and counterproposals for changes in specific provisions of the expired contract, the October 12, document was a new complete proposed collective-bargaining agreement except for wages. This proposed contract, which was discussed by the parties at several sessions, contained the following provisions which, among others, were advanced for the first time:

(1) A 6-year term, with reopener privileges at the end of 3 years on everything except Union security, working foremen, and subcontracting (opening paragraph, page 1).

(2) Maintenance of membership in the Union to be reduced from duration of the agreement (as in the old contract) to duration of 6 months; a check-off provision agreed to on August 6 deleted in favor of a no-check-off provision (Art. II, page 2).

(3) Except for an employee's discussion of his grievance at step 1 with his supervisor (from which his steward was excluded) and the shop committee's regular meetings with

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[11]Kroneker testified that the parties discussed recall procedures at a number of meetings from August through October, the Union's chief interest being in getting the strike breakers out of the plant.

Company representatives, there was to be no grievance or Union activity during regular working hours (Art. IV, pp. 6-8, and Art. V, pp. 9-12).

(4) A proposal that

After the Company issues a discipline slip, warning notice, or discharge notice to an employee, he shall have the right to inform the employee's steward but only at such time as the same can be done outside of the scheduled working hours. (Art. IV, Sec. 10, page 9).

(5) The following provisions:

Art. VI . . .

Section 5. Recall of Striking Employees. Until such time as all employees who were on strike in 1971 have been given an opportunity to return to work or until their right to recall is lost as herein set forth, the Company will not hire new employees into the Bargaining Unit. When the Company desires to fill vacancies or add personnel to the Bargaining Unit, it will recall the oldest employee in point of continuous service with the Company as of April 3, 1971 first, the next oldest employee thus recalled to work must report to work in accord with the provisions of Article VII, Section 8(e) / i.e., within 5 days/ or such employee will be removed from the Company rolls, and seniority shall be forfeited.

Section 5(a). Loss of Employee Status, if Employee Not Recalled. Any employee who was out of work due to the 1971 strike at this Company and who has not been recalled to work on or before April 4, 1972, shall be removed from the Company rolls and shall have no further right to return to work nor any claim against the Company except as he may have vested rights in the Pension Plan.

(6) In layoffs between the time a new agreement is signed and April 4, 1972, all employees to have equal-time seniority, the order of layoff and recall from layoff to be determined by productivity (Art. VII, Sec. 3, page 18).

(7) A drop below an unspecified number of productivity points would be grounds for discharge (Art. VIII, Sec. 1(m) and (o), page 20).

(8) Although laid-off employees could continue their hospitalization coverage by paying all premiums, unrecalled strikers were not to be considered laid off but "not working due to a labor dispute" (Art. XIV, page 36).

(9) The Company is to be given carte blanch with respect to working foremen (Art. IX, Sec. 12, page 30).

The Respondent also resurrected its original proposal 8 (not referred to in its August 6 "Status of Negotiations" document) that a grievance could be presented only by the employee or employees directly affected, without, however, the original addition that the Union could file a grievance which could affect a substantial number of employees (Art. V, Sec. 2, page 9).

The October 12 document also included the subcontracting clause originally proposed by the Respondent and agreed to by the Union on June 22 and 25 (Art. III, Sec. 4(c), page 6).

Over 15 of the provisions listed in the August 6 document as agreed to were either omitted or changed in the Respondent's October 12 proposal."

"Those provisions dealt with such subjects as refusal of a steward to accept a discipline or discharge slip; job loans; transfer from hourly to salary status; plant-wide versus division-wide seniority for lay-off, recall, promotion and transfer, based on old versus new employee concept; overtime; sick leave; bumping into and out of first shift by Union officials; profit-sharing; industrial injury; physical examination on

The October 12 proposal was discussed at a meeting held October 16 and/or October 22, the Union objecting to the above provisions, particularly the exclusion of the Union from disciplinary meetings as contemplated in the proposed Art. IV, Sec. 10, and to the abrogation of prior agreements.

At some time after October 27, the Respondent distributed to employees copies of a memo entitled "Atttendance Guidelines." It contained, among other things, the following:

> 4. A written statement from a physician will be required to substantiate the fact that absence was due to illness and that the employee is released to return to work under the following circumstances:
>
> A. If employee is absent for five (5) or more days in succession.
>
> B. If employee has four (4) or more illness absences in any calendar year.
>
> The memo added that disciplinary action would be taken on each unexcused absence, and that the extent of absences would be considered in each employee's evaluation for merit rating."* The Union was not informed of this document.

At a negotiating meeting held on November 23, the Union made two alternate contract proposals, either one of which it would accept: (1) the old agreement, with the term to be negotiated, plus the 15-cent wage increase which the Respondent had granted during the strike; (2) the same as (1) "except including agreements reached from document /Status of Negotiations/ dated August 6, 1971, pages 1 through 12." The Company rejected both proposals.

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company time; pensions; vending machine money; payment to employee grievants for time lost attending step 4 and 5 grievance meetings; reactivation of dormant departments; job bidding; employee attendance at industrial commission hearing.

The final bargaining session was held December 9, 1971. Under consideration was another draft agreement prepared by the Respondent. In this draft, the Respondent reverted back to a 3-year term, maintenance-of-membership for duration of the agreement, and check-off (Art. II, p. 2). Practically all of the remainder of the Respondent's October 12 proposals were included again in the December 9 draft in identical or substantially similar language. This draft contained, in addition, a detailed merit-rating productivity system (Art. XIV) by which each employee would be periodically classified by his immediate supervisor by skill, and rated for productivity. The employee could appeal his classification and productivity to a committee made up of the general manager, personnel director, and production-control representative. The rating would determine the employee's wage rate (specific rates proposed) and his share of the profits under the profit-sharing plan (Art. XVI, Sec. 6). It further proposed that all employees would have equal-time seniority, and that layoff and recall from layoff would be according to productivity (Art. VII); and that a drop in productivity below a certain specified point would be cause for discharge (Art. VIII).

Either at the December 9 meeting, or shortly thereafter, one of the Union representatives requested permission for the Union's time-study engineer to conduct a job-evaluation study in the plant. Thereafter, the Respondent refused per-

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*The expired agreement provided: "In case of sickness absence more than six (6) times in a year April 4 to April 3, each report off will be accompanied by written doctor report. In the case of sickness, as reported by a doctor report for more than five (5) days absence, a release report from the doctor will be needed to indicate proper recovery to return to work" (Art. X, Sec. 1, page 44). No change in this provision was listed in August 6 "Status of Negotiations" document as agreed to or proposed. No comparable provision appeared in the Company's October 12 or December 9 proposals.

mission because in its opinion a time study would have little value in its particular situation or serve no practical purpose for the Company's particular type of operation.

Shortly before Christmas, the Company distributed to the employees along with their paychecks, copies of a sheet entitled "Gersco News letter." The first section of the letter was entitled "Merit Rating Plan," and began with:

> As previously mentioned informally, management is putting a Merit Rating system into effect.

After explaining that the purpose of the plan was to compensate employees in relation to the Company's progress, the letter stated:

> Full details of the plan will be furnished each employee in the near future. In the meantime we wanted to inform you of the general plan for your background information.

There followed a list of the rating factors, and a description of the method which would be followed in rating employees. The name of Richard Fishburn, Vice-President and General Manager, appeared at the end of the message.

There is evidence that as of the date of the last meeting of the parties, December 9, 1971, 63 strikers had been recalled.

Striker Howard Cooper testified that as a member of the Union bargaining committee and executive board, he was entitled under the old contract to superseniority dating back to January 1, 1942, for purposes of layoff and recall. He testified that he had not, however, been recalled even though two employees named Messner and Hurst, who had seniority dating from after 1942, have been recalled.

The parties stipulated that Christy Nichols, a member of the shop committee on and after April 4, 1971, and therefore within the superseniority section of the expired agreement, has not been offered reemployment."

Striker Friend Eikleberry had been employed as a spray painter in the paint shop for 18 or 20 years. He testified that he reported to the plant "sometime in the forepart of October" in response to a notice to return to work. Rasor gave him a "Request for and Acceptance of Recall" form to sign, and told him there was a job for him in the press room. Eikleberry responded that he would come back to his old job, but would have to think over the press-room offer because "that wasn't my work." Eikleberry left the plant, taking the form with him. Shortly thereafter, Eikleberry received from the Respondent a document dated October 26, 1971, entitled "Separation Notice," giving the reason therefor as "Failed to Report for Work." Personnel Director Rasor testified that Eikleberry expressed reservations about the job offer because he was operating his own well-digging business and because he would not be back in his old job; he said if he decided to come back to work he would bring the document "Request and Acceptance of Recall" and report for work Monday, October 18. When he failed to do so, the Respondent terminated him. Rasor testified without contradition there was no job opening in the paint shop.[22]

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[21]Striker John Keller testified that he was entitled to be recalled before one Sam Horst who was recalled a couple of days before Keller was. However, I find that Keller's testimony in this respect was too vague to be reliable in the absence of any substantiation.

[22]I credit both versions of these events, but find that Rasor's was the more complete.

C. *Analysis and Conclusions*

(1) REFUSAL TO BARGAIN IN GOOD FAITH

Although considerable evidence was introduced regarding the course of the bargaining in the period before and during the strike, chiefly at the insistence of the General Counsel, who offered such evidence as background, it is helpful mainly in providing a contrast to the Respondent's conduct thereafter. Thus, the Respondent, as well as the Union, negotiated during the background period on the basis of proposals and counterproposals regarding suggested changes in and additions to specific provisions of the old contract. Many meetings were held, and concessions were made by both sides.

The Respondent's witnesses, Fishburn and Rasor, credibly testified that their original proposals 6, 8 and 9 (prohibiting employees from leaving work to discuss grievances with stewards or committeemen, requiring grievances to be initiated by employees unless they could affect a substantial number of employees, and requiring written grievances to give the names of all grievants and be signed by at least one grievant) were intended to reduce the amount of company time spent on grievances by employees, stewards, union committeemen, and supervisors at various steps of the grievance procedure, particularly repetitive grievances, and to reduce the amount of company time lost by employees not directly affected congregating, as these matters had proved to be too expensive in the past.[23] As indicated above, two of these proposals, 6 and 9, merely conformed with provisions agreed to by the Union in the prior contract, or with past practices,

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[23] I discredit Kroneker's testimony that the reason given him by the Respondent for making these proposals was that the Company had lost too many arbitrations, as he was unable to substantiate his statement that the Company had indeed lost many arbitrations.

and were in any event withdrawn by the Respondent before the strike. Proposal 8, regarding the initiation of grievances, did not appear in the August "Status of Negotiations" document, and presumably was also dropped.

As to the Respondent's original proposal 7, Fishburn credibly testified that the suspension of stewards for refusing to acknowledge a discipline slip, was proposed because a steward had refused to sign for such slip as required by the old contract. The facts set forth above show that the Respondent on June 25 substituted a tender provision for the 5-day suspension, and, on August 6, accepted a third alternative method of solving this problem.

The General Counsel also suggests that the Respondent refused to bargain regarding the three subjects which were the major issues at the start of the strike — subcontracting, working foremen, and union shop. I do not agree. Both parties vigorously pushed their positions on these issues. The Respondent finally, on June 22, prevailed as to subcontracting, apparently in exchange for an expansion of the category of employees entitled to plant-wide seniority, one of the Union's chief objectives.[*] Although the Respondent rejected several different versions of union shop, I have found above that its representatives did not tell the Union there would never be a union shop, and the record does not show that the Respondent refused to bargain on this issue. The status of working foremen was the subject of the proposals and counter-proposals throughout this entire period.

Although the Respondent's unilateral raising of wages while the issue was under negotiation, and unilateral institution of top-scale hiring not previously offered to the Union, early in June, may have been a breach of faith,[*] that conduct was atypical of the Respondent during the background period. Moreover, I find that the Respondent's momentary va-

cillation of June 25 regarding its June 22 agreement expanding the category of old and new employees was insignificant, in view of the minor difference between what it had agreed to on June 22 and what it proposed on June 25, and its eventual reaffirmation, on the same day, of its previous agreement.

Upon consideration of the undisputed evidence that although many differences had not been resolved, there was much give and take by both sidees, and considering the greater number of Union proposals accepted by the Respondent than the other way around and the nature of the proposals agreed to and still being negotiated, it is my view that the Respondent's overall conduct during the background period was not inconsistent with a desire ultimately to resolve its differences with the Union.

However, with the termination of the strike, the Respondent's attitude toward the negotiations clearly changed. The Respondent attributes this to its developing need to institute a merit-rating productivity system. Fishburn and Rasor testified that early in the strike, Company records indicated that strike replacements were performing more efficiently than the regular employees had performed before the strike. Confirmation by subsequent production figures and studies of the

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[8]I interpret the language in paragraph 2 and 9 of the "Status of Negotiations" document referred to above as confirmation of this view. There is no basis, in my opinion, for interpreting this language as meaning that the subcontracting clause agreed to was contingent on the Respondent's agreeing to an even wider expansion of plant-wide seniority, as the General Counsel contends.

[9]See *N.L.R.B.* v. *Benne Katz, etc., d/b/a Williamsburg Steel Products Company*, 369 U.S. 736.

Lincoln Electric Company of Cleveland, where a merit-rating system was in effect, led management to conclude that such a system was necessary to increase productivity and maintain its competitive status. These circumstances, however, do not explain the following conduct:

(a) The Respondent, early in October, began to deal directly with the recalled strikers, by-passing the Union. Thus, the Respondent required all such employees to sign its "Request for and Acceptance of Recall" form, which the General Counsel accurately describes as a personal-employment contract.[z] The employee was required to acknowledge statements implying that the role of the Union had been reduced, that the Respondent, alone, would determine the terms and conditions of employment, and that the Respondent "will" institute a merit-rating system under which the employee "may be subject to discharge," and "will" determine the future order of layoff and recall[aa] Then followed the "Gersco Newsletter" which advised the employees in even stronger language that the Respondent "is putting a Merit Rating system into effect," with no reference whatsoever to the Union. The Respondent again dealt directly with its employees, by-passing their bargaining agent, when it distributed to them its "Attendance Guidelines" containing an apparent unilateral change in the sick-leave provisions of the old contract.[ab]

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[z]Cf. *ABC Food Service, Inc.*, 176 NLRB 426, 432.

[aa]The facts surrounding the Respondent's use of this document, set forth above, clearly refute the Respondent's suggestions that signing it was voluntary on the strikers' part.

[ab]It is well established that by-passing the Union and dealing directly with employees is indicative of bad faith. *Quality Motels of Colorado, Inc.*, 189 NLRB No. 49, page 13; *Sherwood Ford, Inc.*, 188 NLRB No. 16, page 9; *U-Tote M of Oklahoma, Inc.*, 172 NLRB No.

(b) As indicated above, the parties had, prior to this time, negotiated mainly on the basis of the proposed changes in and additions to specific provisions of the old contract. The Respondent's October 12 proposal, however, was a whole new ball game. The Respondent has offered no reasonable explanation for its withdrawal, in this document, from many provisions to which it had previously agreed which were unrelated to a merit-rating system, other than to insist this conduct was permitted by the parties' ground rules. Although it seems clear that there was no meeting of the minds on what the effect of an agreement or a tentative agreement to a provision would be, I find that the Respondent's wholesale abrogation without good cause of agreement, or tentative agreement, to such provisions painstakingly reached after 6 months of bargaining, was intended to and did broaden instead of narrowing the area of disagreement, and was therefore inconsistent with a genuine desire to resolve differences between the parties.[21]

(c) The Respondent failed to offer any reasonable explanation for advancing the more restrictive demands described above regarding maintenance of membership and checkoff, grievance procedure, and union activity, which would have

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21. page 8. Contrary to the Respondent's contention, these communications with employees, with the intent of by-passing the Union, cannot be equated with past communications at the Union's request or merely to inform employees of what offers had been made to the Union. In view of the Respondent's "duty to treat with no other" than the Union (*Medo Photo Supply Corporation* v. *N.L.R.B.*, 321 U.S. 678), its bad faith was not condoned or waived by the Union's failure to express immediate opposition to this conduct. See *Webb Furniture Corp.*, 158 NLRB 1003.

reduced the role of the Union as the representative of the employees and administration of the contract. The Respondent's only justification for these demands was reduction in costs, but there had been no new developments regarding such costs since the start of the bargaining, when the Respondent considered it necessary to make less restrictive proposals, which it abandoned before the end of the strike. In these circumstances, and in the light of the Respondent's direct dealing wih the employees and wholesale abrogation of provisions previously agreed to, I find that the purpose behind these demands, was contrasted with the Respondent's objectives at an earlier stage of negotiations, was solely to undermine the Union's position as bargaining representative.

(d) On December 9, the Respondent detailed its proposed merit-rating classification system. Although management representatives testified that they had been engaged for months in evaluating employee performance and developing this plan, they conceded that they afforded the Union no opportunity to participate. Then, when the Union, upon being presented with the plan, requested permission to conduct its own time study, which, I find, was relevant and necessary to intelligently deal with the proposal, permission was refused. Such conduct was further indicative of bad faith.[20]

In sum, I find the Respondent, by refusing permission for the Union to conduct its own time study, dealing directly with employees and entering into personal employment contracts with employees in the unit and by-passing the

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[20]*M.F.A. Milling Company*, 170 NLRB 1079, 1098. See, also, *American Seating Company*, v. *N.L.R.B.*, 424 F. 2d 106 (C.A. 5); *McCann Steel Company, Inc.*, 190 NLRB No. 2; *Shovel Supply Company*, 162 NLRB 460.

Union, and by abrogating agreements and proposing more stringent provisions without reasonable cause, failed and refused to bargain in good faith, in violation of Section 8(a)(5) and (1) of the Act."

"See *General Electric Company*, 192 NLRB No. 9; *General Electric Company*, 186 NLRB No. 1; *Wald Manufacturing Company*, 176 NLRB 839, page 844, enforced 426 F. 2d 1328 (C.A. 6). See also, *N.L.R.B.* v. *Truitt Manufacturing Co.*, 351 U.S. 149. I do not understand the General Counsel to contend that the merit-rating proposal itself was indicative of bad faith. In any event, I would find changed circumstances constituting reasonable cause for the Respondent's making of this proposal.

"I have carefully considered the additional grounds relied on by the General Counsel to support his bad-faith allegation, but find no merit in them. (1) I do not construe the proposal that unrecalled strikers be considered "not working due to a labor dispute" as calling for their exclusion from hospitalization coverage. (2) No reason nor precedent has been called to my attention for finding bad faith in proposing that strikers not recalled within a year be terminated; nor would the evidence support a finding that this proposal was made in retaliation against such employees for striking. (3) I find the termination of Friend Eikleberry was not unlawful in the circumstances described above. (4) The General Counsel's contention with regard to the payment of replacements and recalled strikers on and after September 15 at a rate which included the 15-cent wage increase unilaterally granted in June is time barred. *N.L.R.B.* v. *Byran Mfg. Co.*, 362 U.S. 411. (5) In view of the number of issues upon which agreement had not been reached on August 6, I find no bad faith in the Respondent's refusal to accept either of the Union's two alternate proposals of November 23.

(2) ALLEGED UNILATERAL CONDUCT

(a) The complaint alleges that the Respondent unilaterally instituted a merit-rating system affecting its employees. The only evidence presented by the General Counsel in support of his contention that the Respondent actually put its proposed merit system into effect was the testimony of striker Carl Wade who returned to work on October 19, 1971. Wade testified that two days after his return, production bodies department superintendent Eddie Shields told him:

> There would be a merit system put into effect shortly and our performance from then on would determine what pay or what we could receive through productivity or our actions. That this all meant profit if we kept working, we would be sure to work 8 hours a day. . . I asked him about seniority rights, he says we was playing it by ear, he couldn't answer that.

When asked whether there is a merit-rating system in the plant, Wade replied, "I couldn't answer that." He testified that he did not know whether he had been merit-rated, and that was no difference in his pay because of any merit-rating system.

Fishburn and Rasor testified that no merit-rating system has been put into effect, and that no one has been rated.

In my opinion, Wade's testimony fails to support this allegation, leaving the denials of Fishburn and Rasor, which I credit, substantially undisputed. I shall therefore recommend dismissal of this allegation.[23]

(b) The complaint alleges that the Respondent unilaterally eliminated superseniority of Union officers, contrary to past practice and its agreed-upon proposals during the recent contract negotiations.

The evidence presented by the General Counsel consists of the facts set forth above that the Respondent has failed to recall striking Union officials Howard Cooper and Christy Nichols, who, it is undisputed, were entitled under the old contract to superseniority dating back to January 1, 1942, and that the other strikers with straight-time senority dating from after 1942 have been recalled.

The old contract provides as follows with regard to superseniority:

> Article IV, Sec. 11. Seniority of Designated Individuals. The stewards during the period of their office shall have greater seniority than any other bargaining unit employee other than shop committeeman and the recording secretary. A member of the shop committee and the recording secretary, during the period of their office, shall have more seniority than any other bargaining unit employee. However, employees who were employed by the Company and on the payroll on or before January

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[20]The complaint alleges that the Respondent unilaterally discontinued its past practice with respect to seniority and instituted a different method of computing seniority. To the extent that this allegation refers to the merit-rating system, it is dealt with above. To the extent it refers to supersenority for Union officers, it is dealt with below.

> 1, 1942, shall not be affected by the provision of this paragraph. Superseniority provided for herein to the designated individuals shall apply to layoff and recall only.

The Respondent contends that this provision applied only to recall from layoff and not to recall from a strike. I find that the provision on its face is not clear as to whether it applied to recall from a strike or to recall from a layoff only. Union Representative Kroneker testified that under this provision, a union committeeman "will have superseniority over other employees for layoff purposes." Kroneker was asked, "Would that operate in the case of recall of layoff?" He replied, "Not recall, but layoff because he wouldn't be laid off." It is noted that the Respondent in its September 15 letter advised the Union of its intent to recall strikers "in line of strict 'time' seniority." Although this proposal excluded granting superseniority to Union officers, there is no evidence that the Union, at its September 21 meeting with the Respondent or thereafter, questioned the exclusion.

There is no evidence of past practice. The record indicates that the Union has struck the plant on three past occasions; all three strikes were of short duration; none of the strikers was replaced; and all returned to work at the end of the strike.

There is no evidence that the parties reached agreement or tentative agreement on any change in this provision of the old contract or any new superseniority provision.

I therefore find that the evidence fails to show that superseniority for recall of Union officers from a strike was required by the old contract, past practice, or any agreement during the recent negotiations. In these circumstances, I conclude that a preponderance of the evidence fails to support the allegation that the Respondent unilaterally eliminated superseniority of Union officers, and I shall recommend that this allegation of the complaint be dismissed.

(c) The complaint alleges that the Respondent unilaterally terminated the existing hospitalization plan.

The General Counsel's evidence consisted of testimony by employee Wade to the effect that he has "a question about" whether the health insurance plan in effect is the same plan which was in effect before the strike, because, he said, "We had on top of the form, we had 365 day coverage. On top of this form it says 120." No such forms are in evidence, and Wade added that he has not had occasion to apply for benefits since before the strike and has not compared the insurance contracts.

As opposed to this vague and unsupported testimony, Fishburn and Rasor credibly testified that although the cost of the premiums has increased, there has been no change in the hospitalization coverage of employees.

I therefare find that this allegation falls for failure of support by a preponderance of the evidence, and recommend that it be dismissed.

III. THE REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, I shall recommend that the Respondent cease and desist therefrom and from any like or related interference with the rights of its employees guaranteed in Section 7 of the Act, and that it take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in the case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[2]

ORDER

The Respondent, The Gerstenslager Company, Wooster, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to bargain collectively in good faith with International Union Allied Industrial Workers of America, AFL CIO Amalgamated Local Union No. 813 as the exclusive collective-bargaining representative of an appropriate unit of all hourly rated plant employees, excluding all office clerical employees, professional employees, and supervisors as defined in the Act, concerning rates of pay, wages, hours of work, and other terms and conditions of employment, by refusing permission for the Union to conduct its own time study, by dealing directly and entering into personal employment contracts with employees in the unit and by-passing the Union, and by abrogating agreements and proposing more stringent provisions without reasonable cause, or in any other manner refusing to bargain in good faith with the Union.

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[a]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request, bargain collectively in good faith with the above named labor organization, as the exclusive representative of its employees in the above described appropriate unit, concerning rates of pay, wages, hours of work, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its plant in Wooster, Ohio, copies of the attached notice.* Copies of said notice, on forms provided by the Regional Director for Region 8, after being duly signed by the Respondent's representative, shall be posted by it immediately upon request thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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*In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the Notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Notify the Regional Director for Region 8, in writing, within 20 days from the receipt of this decision, what steps the Respondent has taken to comply herewith.*

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges violations of the Act not found herein.

Dated at Washington, D. C.

ALMIRA A. STEVENSON,
Trial Examiner

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*In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 8, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

APPENDIX

Notice to Employees

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT fail or refuse to bargain collectively in good faith with INTERNATIONAL UNION OF ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO, AMALGAMATED LOCAL UNION No. 813, as the exclusive collective-bargaining representative of our employees in the appropriate unit described below, concerning rates of pay, wages, hours of work, and other terms and conditions of employment, by refusing permission for the Union to conduct its own time study, by dealing directly and entering into personal employment contracts with employees in the unit and by-passing the Union, and by abrogating agreements and proposing more stringent provisions without reasonable cause, or in any other manner refusing to bargain in good faith with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act.

WE WILL, upon request, bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of all our employees in the appropriate unit, which is:

> All hourly rated plant employees, excluding all office clerical employees, professional employees, and supervisors as defined in the Act.

THE GERSTENSLAGER COMPANY
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an Official Notice and Must not be Defaced by Anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1695 Federal Office Building, 1240 E. 9th Street Cleveland, Ohio 44199 (Tel. No. 216-522-3725).

COURT, U. S.
No. 73-1340

MAY 3

MICHAEL RODAK,

In the Supreme Court of the United States

OCTOBER TERM, 1973

THE GERSTENSLAGER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

PETER G. NASH,
General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

PATRICK HARDIN,
Associate General Counsel,

NORTON J. COME,
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ROGER T. BRICE,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

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OPINIONS BELOW

The court of appeals did not issue an opinion. The decision and order of the National Labor Relations Board (Pet. App., pp. 11-50) are reported at 202 NLRB No. 40.

JURISDICTION

The judgment of the court of appeals was entered on December 13, 1973 (Pet. App., pp. 9-10). The petition for a writ of certiorari was filed on March 4, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the company failed to bargain in good

faith, and thereby violated Section 8(a)(5) and (1) of the National Labor Relations Act.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

> Section 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * * * *
>
> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *.

STATEMENT

A. The Board's Findings of Fact

The Union[1] has represented the Company's hourly-paid production workers since 1941 (Pet. App., p. 16; A. 280, 289).[2] The Company and Union have executed a series of collective bargaining agreements, the most recent of which expired on April 4, 1971 (Pet. App., p. 17; A. 109).

Pursuant to the Union's notice, the parties met on February 10, 1971[3], to begin negotiating a new agreement (Pet. App., p. 17; A. 109-110). At that time, the Union presented 91 proposed modifications of the existing contract, and, on February 17, the Company countered with 30 of its own proposals (Pet. App., pp. 18-19; A. 150). On April 4, immediately following expiration of the contract, the Union went on strike. Although the parties had met approximately 12 times prior to the strike, major issues still separating the parties were the union shop, the use of working foremen, and subcontracting (Pet. App., p. 21; A. 125-126).

During the strike, the parties continued to negotiate and the Company continued operations by hiring permanent replacements for the strikers (Pet. App., p. 22; A. 238-239). On August 4, the parties conducted an "in depth" review of the bargaining, in a session characterized by "give and take" on both sides. On August 6, the Company issued a document entitled "Status of Negotiations", which listed 6 Company, 20 Union, and 5 "joint"

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[1]International Union Allied Industrial Workers of America AFL-CIO, Amalgamated Local No. 813.

[2]"A." refers to the appendix to the briefs in the court below.

[3]All dates refer to 1971 unless otherwise specified.

proposed changes in the old contract as having been agreed upon by both parties. The document further indicated that 53 proposals were still on the table. (Pet. App., pp. 23-25; A. 241-242; G.C. Exh. 10.)

On August 30, the Union offered to end the strike if all the strikers were recalled. After the Company rejected the offer, the Union requested that the Company state its position on reinstatement of the strikers (Pet. App., p. 25; A. 141, 159-160). The Company replied by letter dated September 15, which stated:

> 1. If the Union * * * offers unconditionally to call off the current strike, the Company will, when openings become available, take back the presently striking employees in line of strict "time" seniority.* * *
>
> 2. In the event of a subsequent layoff, the Company will consider all employees, then working, for layoff purposes, to be of equal seniority. The Company will put into effect a rating system, the details of which have not been definitely worked out, whereby each plant worker will be rated by his supervisor and one other Company official at periodic intervals. The rating will be based primarily on the individual's productivity. In a layoff, the least productive according to the last ratings will be laid off. [Pet. App., pp. 25-26; A. 297-298.]

On September 16, the Union sent the Company a letter unconditionally offering to return all strikers to work. Following the removal of all pickets on September 18, the parties held a meeting at which the Union expressed disagreement with the Company's September 15 proposal, which, in effect, abolished seniority. The Company agreed to recall strikers as vacancies occurred. (Pet. App., p. 27; A. 134, 143-144, 163, 296.)

In early October, the Company began recalling strikers in order of seniority, but it required each employee to sign a personal employment contract as a condition of reinstatement (Pet. App., p. 39, n. 27; A. 68-71). The Company did not notify the Union of this requirement nor did it discuss the contracts with the Union (Pet. App. 29; A. 71). In relevant part, the personal employment contracts stated:

> The employee acknowledges * * * that any provisions of former contracts do not apply * * * between himself and the Company, except as the same may be required by law.
>
> The employee acknowledges that his employment shall be upon the same terms and conditions as that of employees hired since April 4, 1971 * * * and that he is aware that many such terms and conditions will be further developed in the future by the Company.
>
> The employee acknowledges that * * * employees will be * * * classified as to skill and productivity * * * and that persons failing to maintain certain merit rating levels may be subject to discharge.
>
> The employee acknowledges that lay-off or recall * * * and certain other rights will be dependent upon individual merit rating rather than prior length of service. [Pet. App., pp. 27-29; A. 299-300.]

On October 12, the Company submitted entirely new proposals. In contrast to its prior offerings, which proposed changes in specific provisions of the expired contract, the Company's new proposals were, essentially, a completely new collective bargaining agreement. The Company's proposal changed or omitted 15 provisions

that had been agreed upon in the August 6 "Status of Negotiations," and contained 9 provisions advanced for the first time. Some of the new proposals were: a six year contract term with limited reopening rights after 3 years; a "working foreman" provision that would give the Company complete control in this area; and a provision that all seniority rights and rights of recall would be terminated by April 4, 1972, when, presumably, the rating system suggested in the Company's September 15 letter would be in full force and effect. (Pet. App., pp. 29-31; A. 181, 254-255, G.C. Exh. 11.)

On November 23, after fruitless objection to the Company's new proposals, the Union offered to accept either of two alternatives: (1) the old agreement with the terms to be negotiated, plus a 15-cent wage increase that had already been granted during the strike; or (2) the same, but including the agreements specified in the "Status of Negotiations" on August 6. The Company rejected both proposals. (Pet. App., p. 32; A. 251-252.)

Shortly thereafter, the Company, without informing the Union, distributed a memo to its employees that delineated new work rules in regard to attendance and stated that unexcused absences would thereafter be considered in each employee's merit rating evaluation. (Pet. App., p. 32; A. 301-302.)

On December 9, the Company submitted another draft agreement that largely reaffirmed its October 12 proposals and also more fully elaborated the details of the proposed merit rating system. Under the Company's merit rating plan, each employee would be periodically classified by job skill and rated for productivity. The employee could appeal his classification and productivity rating to a Company committee that did not include Union representation. The rating would determine the employee's wage rate and his share of the profits in a pro-

posed profit sharing plan. The plan also provided that all employees would have equal seniority, with layoffs and recall determined by productivity, and that a drop in productivity below a specified point would be cause for discharge. (Pet. App., p. 33; G.C. Exh. 16.) Upon receiving the new merit rating proposal, the Union requested permission to conduct its own job evaluation study in the plant. The Company adamantly refused this request. (Pet. App., pp. 33-34; A. 148, 249-250.)

Thereafter, negotiations ceased. The Company, however, distributed to its employees a sheet entitled the "Gersco News Letter," which stated that it was going to implement the merit rating system. The letter also explained the system in some detail and promised that full details of the plan would be distributed in the future. (Pet. App., p. 34; A. 292-295.)

B. The Decisions Below

The Board found that the Company—by withdrawing from numerous tentative agreements and offering more stringent provisions without reasonable cause, dealing directly with the employees to undermine the Union, and refusing to permit the Union to conduct a time study to evaluate Company proposals—refused to bargain in good faith, and thereby violated Section 8(a)(5) and (1) of the Act (Pet. App., pp. 41-42). The Board ordered the Company to cease and desist from the unfair labor practices found, and to bargain with the Union upon request (Pet. App., pp. 47-50).

The court below held that there was substantial evidence to support the Board's findings and conclusions. Accordingly, it enforced the Board's order. (Pet. App., pp. 9-10.)

ARGUMENT

1. Section 8(a)(5) of the Act requires an employer to bargain in "good faith" with the chosen representative of his employees. The question of good faith involves largely a factual determination based upon an appraisal of the total conduct of the parties. *National Labor Relations Board* v. *Insurance Agents' Union*, 361 U.S. 477, 498-499. The Board found that, once the Company was certain that it had broken the Union's strike, its attitude toward the negotiations changed radically; abandoning its effort to negotiate a collective bargaining agreement, the Company engaged in a concerted effort to undermine and debilitate an already weakened Union. Since the court of appeals concluded that the record supported the Board's findings, petitioner's challenge to those findings presents only an evidentiary issue which does not warrant further review. See *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395, 409-410; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 488.

2. Contrary to petitioner's assertion (Pet., p. 7), the Board's decision does not fault the Company for failing to sign a contract to which it never agreed. The Board found that the Company's abrupt withdrawal from the tentative agreements coupled with its stringent new proposals was not based upon the exigencies of changing circumstances, but rather upon a "bad faith" intention to broaden the rift between the parties (Pet. App., pp. 40-41). Moreover, the Board's order does not require the Company to agree to any particular contract provisions, but only to cease and desist from "abrogating agreements and proposing more stringent provisions *without reasonable cause*" (Pet. App., p. 47, emphasis added).

Fafnir Bearing Co. v. *National Labor Relations Board*, 362 F. 2d 716, 720-722 (C.A. 2) (Pet. App., p. 8), supports, rather than detracts from, the Board's finding that the Company improperly rejected the Union's request to conduct a time study of the Company's merit rating proposal. In the instant case, as in *Fafnir*, the Board found that the Union time study was relevant and necessary to enable it intelligently to deal with the Company's new merit rating proposal (Pet. App., p. 41), and no evidence was offered to support the Company's belated claim that such a study would disrupt the plant.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

PATRICK HARDIN,
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MAY 1974.

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